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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 725

IN THE MATTER OF
MARATHON FOUNDRY AND MACHINE COMPANY,
A CORPORATION, DEBTOR,
Petitioner,

vs.

JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES OF MARATHON FOUNDRY AND MACHINE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS, JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES, IN OPPOSITION.

FRANCIS S. CLAMITZ,
Attorney for Joseph Schwartz, and Francis J. Curtis, Trustees, Respondents.

MANUEL E. COWEN,
MARTIN S. GERBER,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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OPINION BELOW.

The opinion below is printed in full and in Appendix A, pages 17 to 25 of petition for certiorari.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Did the District Court, in a proceeding under Chapter X of the Bankruptcy Act, have power to order a sale of certain securities owned by the Debtor, but not used in its manufacturing operations, which were in the possession of the pledgees thereof and who had been restrained from selling, for over two years, where the trustees had no funds to discharge the pledge, and where heavy interest charges were accruing, and there remained, after said sale, the real estate, manufacturing facilities and other assets of the debtor, for reorganization.

STATUTE INVOLVED.

Section 115 of the National Bankruptcy Act; 11 U. S. C. A. 515:

> "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

Section 116 (3) of the National Bankruptcy Act; 11 U. S. C. A. 516 (3):

> "Upon the approval of a petition the judge may in addition to the jurisdiction, powers and duties in this chapter conferred * * * (3) authorize a receiver or trustee upon such notice as a judge may prescribe and upon cause shown * * * to sell any property of the debtor real or personal upon such terms and conditions as the judge may approve."

I.

STATEMENT OF FACTS.

The facts of the case have been incompletely stated by the petitioner. The respondents, trustees of the Estate of Marathon Foundry and Machine Company, a corporation, debtor, will therefore present their additional statement of pertinent facts.

The stock of Bethlehem Foundry and Machine Company ordered sold below was acquired as an investment by the debtor and not used in the operation of the debtor's business (R. p. 6). Said Bethlehem stock was pledged for approximately $523,000 (R. p. 95), and the United States claimed a lien for taxes in the sum of $150,000 (R. p. 95, pp. 115-121), to attach to the debtor's interest. The pledgees have been restrained for over two years from selling the Bethlehem stock (R. p. 94); the trustees have insufficient funds with which to redeem the stock. As of April 30th, 1955, they had only $13,000 (R. p. 57). Heavy interest charges have accrued on the loan for which the stock had been pledged, and the holders of the stock possess a power of sale of the stock pledged (Petitioner's Appendix A, p. 24).

A sale of the pledged Bethlehem stock would produce funds in excess of $250,000, for effectuating a possible plan of reorganization, or for distribution to creditors after the payment of the secured claims thereon (R. p. 5).

For many months efforts were made by the trustees to formulate a plan of reorganization in conjunction with the debtor (R. p. 5). Upon failure to consummate such negotiations, a plan has been filed by trustees. At no time did the debtor ever propose or suggest any plan of reorganization.

As a step in the administration of the estate which would form the basis for a trustees' Plan of Reorganization, the trustees, Joseph Schwartz and Francis J. Curtis, requested instructions of the United States District Court, by a petition filed on March 14th, 1955 (R. p. 4), advising the court that it would be to the best interests of all parties to sell the pledged stock in the Bethlehem Foundry and Machine Company owned by the debtor as an investment (R. p. 6), trustees having no funds with which to redeem the same (R. p. 57), that such sale would make possible the payment in full to secured creditors and effectuate a plan of reorganization using the cash derived from the sale and the other substantial assets of the debtor in such plan; that trustees had obtained an offer of $800,000 for the pledged Bethlehem stock (R. p. 8), free and clear of any lien.

On the hearing of trustees' petition for instructions an order was entered on March 14th, 1955 (R. p. 13); that all parties in interest, the Securities and Exchange Commission, Director of Internal Revenue, Secretary of the Treasury show cause why 32,126 shares of Bethlehem Foundry and Machine Co. stock should not be sold free and clear of all liens and encumbrances to Metals Disintegrating Co., for $25 per share, or to such bidder who makes a higher and better bid; a competent, disinterested, appraiser was appointed to appraise the shares of stock sought to be sold. It was further ordered that service of the order of March 14, 1955, together with the petition upon which it was based, be made upon all known creditors of the debtor, stockholders of the debtor, the Securities and Exchange Commission, the Secretary of the Treasury, the secured creditors of the debtor by mail, and that notice by publication be given. It was further ordered that other and higher bids might be made at the hearing set by

the order. Accordingly, a qualified appraiser was appointed by the court and an appraisal made, which was filed of record. Notice by mail and publication was given to all parties; the hearing was held pursuant to said order on April 4th, 1955 on the continued hearing held April 27th, 1955 before Referee Martin Ward, acting as Special Master (R. p. 19), testimony in support of the petition was taken, expert testimony as to the valuation of the Bethlehem stock was presented by the trustee, the appraiser appointed by the court testified as to the valuation of the Bethlehem stock, and fixed the valuation thereof at $775,000, free and clear of liens (R. p. 26 and p. 106). The debtor did not, nor did any other party in interest, offer any evidence or seriously contest the valuation fixed by the appraiser, nor did any party introduce any evidence to controvert the allegations of the petition for instructions regarding said sale of stock. There was competitive bidding (R. pp. 32-36), and the sum of $910,000 was bid for the Bethlehem stock, free and clear of all liens; this was the highest and best bid made by the Intelectron, Inc., a corporation (R. p. 35); the sale was urged by the unsecured creditors' committee (R. p. 81).

The order of sale of the pledged Bethlehem Foundry and machine Company stock, entered by Judge Campbell on May 27th, 1955, provided, among other things, that the said stock should be sold unless (a) suggestions for a plan assuring to the estate and creditors thereof a greater return than the bid of Intelectron, Inc., with security for the consummation thereof, were filed by June 24th, 1955, (This time was extended until July 11th, 1955, on motion of the debtor.) (R. p. 98), or, (b) there shall have been deposited by May 20th, 1955, sufficient funds to discharge all of the debts of the debtor and costs of administration; or (c) the trustees shall have filed by

July 20th, 1955, their plan of reorganization providing for retention or other disposition of the Bethlehem Foundry and Machine Company stock. None of these events has occurred.

The only plan presented was that filed by the trustees on July 20th, 1955. Said plan recognizes and adopts the sale of the pledged stock in Bethlehem Foundry and Machine Company to Intelectron, Inc., and provides for the use of the equity derived therefrom, and for the placing of the remainder of the assets of the debtor in a new company to be formed, pursuant to the plan of reorganization filed.

The debtor's assets, in addition to the pledged Bethlehem Foundry and Machine Company stock, consist of a manufacturing plant appraised at $294,019 (R. p. 52), and equipment appraised at $133,000 (R. p. 54), located at Wausau, Wisconsin (Tr. pp. 40-50), under lease to Wausau Manufacturing Company, a subsidiary of Borg-Warner Corporation, together with certain manufacturing equipment located in said plant (Tr. p. 52); controversial claims against various individuals and indirectly against the United States Government, aggregating approximately $350,000 (Tr. p. 58); approximately $165,000 is held by the Chicago Title & Trust Company, pursuant to order of court, to insure payment of certain tax and lien claims.

On July 28th, 1955, the United States District Court entered an order finding that no plan had been filed by any one but the trustees, and again directing the trustees to consummate the sale of the shares of stock in the Bethlehem Foundry and Machine Company to Intelectron, Inc., in accordance with the order entered on May 27th, 1955, which is the order appealed from below.

REASONS FOR DENYING THE WRIT.

I.

There Is No Conflict Between the Decisions of the Court of Appeals and the Decisions of This Court or Between the Decisions of Other Courts of Appeal.

The decision of the Circuit Court of Appeals for the Seventh Circuit is not in conflict with the decisions of any Circuit Court of Appeals and is eminently correct in regard to the application of the law to the facts in the instant case.

The facts in the instant case where a pledged investment is ordered sold, upon due notice to all parties, after appraisal and on competitive bidding, and at a price in excess of the appraisal, cannot be compared with the facts in *In re Solar Mfg. Corp.*, 176 Fed. (2d) 493, decided by the Court of Appeals, for the Third Circuit, cited by petitioner, where there was a proposed sale of all the principal assets of a manufacturing company, and where there was no adequate notice, no appraisal, no competitive bidding, and where creditors, the Securities and Exchange Commission, and a labor union objected, and where the court held that under those facts, a sale would not be ordered *except* upon the showing of "an emergency."

The *Solar* case is not in point with the instant case on the facts, but both the *Solar* case and the instant case, however, cite and base their holding on the rule set forth in *Frank* v. *Drinc-O-Matic*, 135 Fed. (2d) 906, decided by the Court of Appeals, Second Circuit, which holds that: "The petition having been approved, the court had power to sell 'any' property of the debtor, 'upon such terms and

conditions as the judge may approve.' Sec. 116 (3) of the Bankruptcy Act."

In the case of *V. Loewer's Gambrinus Brewing Co., Inc.*, Second Circuit, 141 Fed. (2d) 747, the court considered, in a Chapter X proceeding, the sale of all of the income producing property of a brewery.

In that case, the Court of Appeals said:

> "The appellant lays great stress upon the fact that here the sale was of all income-producing property of the debtor and hence was likely to prevent the adoption of any plan of reorganization and to defeat the very purpose of the reorganization proceeding. But the disposition of the property could not be longer delayed without peril to all interests. The properties were wasting assets and Section 116 (3) of the Chandler Act authorizes the sale of 'any' of them. * * * There is no requirement in the Chandler Act that the sale be in aid of a reorganization or that it await a liquidation in straight bankruptcy. Our decision in *Frank* v. *Drinc-O-Matic,* 136 F. (2d) 906, is authority for the order of sale appealed from unless the opinion of Justice Roberts in *Fidelity Assurance Assn.* v. *Sims,* 318 U. S. 608, stands in the way. But that opinion would not seem to have any bearing on the situation here. It merely states that a petition for reorganization where liquidation, and not a readjustment of the rights of creditors, was at the very outset, the only possibility, should be dismissed, as not filed in good faith. * * *"

In *Loewer's Gambrinus,* the court thus reaffirmed its holding in *Frank* v. *Drinc-O-Matic,* and disposed of the case of *Fidelity Assurance Assn.* v. *Sims,* 318 U. S. 608, cited by petitioner.

There is no conflict between the holding in the *Loewer's Gambrinus* case and in the instant case. The comment of the court in the *Loewer's Gambrinus* case, discussing the

Fidelity Assurance Assn. v. *Sims* case, applies with equal force to the case at bar.

The instant case, having been found to have been filed in good faith, is not in conflict with the case of *Fidelity Assurance Assn.* v. *Sims, supra,* cited by petitioner, particularly in view of the fact that trustees have filed their plan of reorganization, as stated by the Circuit Court of Appeals for the Seventh Circuit, in their opinion. Petitioner concedes that *Fidelity Assurance Assn.* v. *Sims* is controlling only on the issue of good faith (Pet. p. 8).

The case of *In re: Pure Penn Petroleum Co.* (C. C. A. 2), 188 Fed. (2d) 851, cited as a controlling authority by petitioner, is perfectly reconcilable with the *V. Loewers Gambrinus* case, and the *Frank* v. *Drinc-O-Matic* case, decided by the Second Circuit, and the *Solar Mfg. Corp.* case, decided by the Third Circuit. It clearly follows the reasoning of the same Court of Appeals in the earlier case of *V. Loewers Gambrinus Brewing Co., Inc.,* case, 141 Fed. (2d) 747, in which it was held that sales of perishables in a Chapter X proceeding were authorized under Sec. 115 of the Bankruptcy Act, and that sales of other assets, for cause shown, could be sold under Sec. 116 (3). The quotation from *Pure Penn Petroleum Co.,* set forth on page 12 of debtor's petition for a Writ of Certiorari, when read in the light of the *V. Loewers Gambrinus* case, shows that the Circuit Court for the Second Circuit, has consistently held that a sale will be authorized where an emergency exists *or* where the court finds "cause".

Because the *Pure Penn Petroleum Co.* case involved a Chapter XI proceeding, it is in no event a controlling authority as contended by petitioner.

The case of *Frank* v. *Drinc-O-Matic, supra,* is based upon facts nearly parallel to the instant case. There was no fund available to redeem vending machines in the hands

of a lien holder. In the instant case, there are no funds available to redeem the Bethlehem stock (approximately $525,000 required). In the *Frank* v. *Drinc-O-Matic* case, as in the instant case, due notice was given to all known creditors. There, too, the petition had been approved as having been filed in good faith, as in the case at bar.

In its opinion, quoted in full herein, the court said:

> "This is an appeal from an order in bankruptcy directing the sale for $9500 of nineteen automatic vending machines belonging to the debtor, which were in the possession of their manufacturer, who claimed a lien upon them in the sum of $4,754.79. It is not necessary to state in detail the evidence which justified the sale in the minds of the special master and the district judge who confirmed his report. Notice of the application was given to all known creditors, and the situation of the debtor was such as might well make it desirable to release the machines from the vendor's claim even if its validity was questionable, which there is no reason to suspect. The trustee had no funds with which to redeem the machines, and after six months no plan of reorganization had been proposed. Possibly, though not certainly, the sale will force on a liquidation; in any event that is not a controlling consideration. The petition having been approved, the court had power to sell any property of the debtor, 'upon such terms and conditions as the judge may approve.' Sec. 116 (3) of the Bankruptcy Act, 11 U. S. C. A., Sec. 516 (3). To succeed the appellants must persuade us to substitute our discretion for that of the district court, and that under familiar principles we should not, and will not do.
>
> "Order affirmed."

The Court of Appeals for the Third Circuit, in the case of *In re: Solar Manufacturing Co.*, 176 Fed. (2d) 493, cites the *Frank* v. *Drinc-O-Matic* case with approval.

The Court of Appeals for the Second Circuit has simi-

larly approved and cited the *Frank* v. *Drinc-O-Matic* case, in the case of *V. Loewers Gambrinus Brewing Co., Inc., supra,* and the Court of Appeals for the Seventh Circuit, in the instant case, has followed the reasoning of and cited the *Frank* v. *Drinc-O-Matic* case in its opinion below.

SUMMARY.

There is no conflict between the decisions of the Seventh Circuit and the Second or Third Circuits, as contended by petitioner, for the following reasons:

(a) The decision of each of the cases is based upon the principle that a court may order the sale of a perishable asset under the equitable powers granted by Sec. 115 of the Bankruptcy Act and of "any" asset for cause shown under Sec. 116(3) of the Bankruptcy Act.

(b) The instant case involves the specific question of the sale of a pledged asset, not used in the business of the debtor, and where the pledgees have, for over two years, been restrained from sale of their security and the trustees have been unable to redeem the property for want of funds.

There is no conflict with the decision of this Court in *Fidelity Assurance Assn.* v. *Sims, supra;* that case having been decided on the finding that the petition therein had not been filed in good faith, whereas, in the instant case, the petition has been approved as having been filed in good faith.

The Decision of the Court of Appeals Is Clearly Correct.

The opinion of Judges Major, Finnegan and Schnackenberg carefully considers the factual background of the case at bar, analyses the contentions of the appellant, petitioner here, comments on abortive efforts of the debtor, by its sole stockholder to press upon the court a nebulous

proposal for a loan, states that no plan, more advantageous to creditors than the sale of the Bethlehem, has been suggested by anyone, and, that the trustees have filed a plan of reorganization. The court then states sections 111, 126, 115 and 116 of Chapter X of the Bankruptcy Act and concludes that power exists to make a sale of the pledged Bethlehem stock under the particular circumstances of the instant case, citing *Frank* v. *Drinc-O-Matic,* 136 Fed. (2d) 906, which is hereinbefore commented upon. The question of discretion of the Trial Court is discussed and the factors involved in the exercise of that discretion are reviewed. The court considered the fact that Debtor had invoked the jurisdiction of the Court, that two years had elapsed since the filing of the petition, that at the time the trustees petitioned for instructions, no plan had been filed, that the Bethlehem stock ordered sold was not used in the conduct of its business, that the Bethlehem stock was pledged, and that heavy interest charges had accrued; that the trustees had insufficient funds with which to redeem said stock, and that the pledgees were holding a power of sale of the Bethlehem stock which they were prevented from exercising by the pendency of the reorganization proceedings. These circumstances, together with the fact that proper notice to all parties had been given, no creditor had objected, an appraiser appointed by the court had valued the stock at $775,521.64, and that a bid of $910,129.58, had been made, that neither the debtor nor the sole stockholder had made a bid at the sale, and the sale, if consummated, would pay the secured creditors in full, and leave a substantial balance for expenses of administration and general creditors. These circumstances formed the factual basis for the order of the trial court, and on these facts, the Court of Appeals found that the trial court had not abused its discretion.

III.

There Is No Important Question of Federal Law.

There is involved no new or important question of Federal Law. The decision below rests upon a sound, accepted application of the law to particular facts in this case. Any other interpretation would disregard the legislative intention to allow a District Court a wide discretion in the handling of proceeding under Chapter X of the Bankruptcy Act. Sections 115 and 116 (3) of the Bankruptcy Act spell this out so plainly that argument should be unnecessary.

CONCLUSION.

The decision of the Court of Appeals being in confirmity with the decisions of this court, and the decisions of other courts of appeals, and no important question of federal law having been presented, the petition for writ of certiorari should be denied.

Respectfully submitted,

FRANCIS S. CLAMITZ,
Attorney for Joseph Schwartz and Francis J. Curtis, Trustees, Respondents.

MANUEL E. COWEN,
MARTIN S. GERBER,
Of Counsel.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF RESPONDENT LOUIS DREYFUSS.

HENRY S. BLUM,
110 S. Dearborn Street,
Chicago, Illinois,
Counsel for Respondent,
Louis Dreyfuss.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES OF MARATHON FOUNDRY AND MACHINE COMPANY, AND LOUIS DREYFUSS,

Respondents.

OPPOSING BRIEF OF LOUIS DREYFUSS, RESPONDENT, TO PETITION FOR WRIT OF CERTIORARI OF MARATHON FOUNDRY AND MACHINE COMPANY, A CORPORATION, PETITIONER.

STATUTE INVOLVED.

Section 115 of the Bankruptcy Act; 11 U. S. C. A., Section 526:

> "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it

had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

Section 116(3) of the Bankruptcy Act; 11 U. S. C., Section 516 (3):

"Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers and duties in this chapter conferred and imposed upon him and the court

* * * * *

"(3) Authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve;"

QUESTIONS PRESENTED.

1. In a Chapter X proceedings where a pledgee of corporate stock (acquired by the debtor as an investment) has been under restraining order for more than two years and no suggestion appears of a method to satisfy the debt of the pledgee except by the sale of the stock does the District Court have power to order a sale of the pledged stock for the satisfaction of the debt of the pledgee and the salvaging of the equity for the estate?

2. Is there any conflict on the above facts between decisions of Courts of Appeals in different circuits or between decisions of the Supreme Court and that of the Court of Appeals in the instant case?

STATEMENT OF THE CASE.

We supplement the statement of the case of petitioner by the following matters:

The Appellee, Louis Dreyfuss, is a pledgee of the 32,126 shares of stock of the Bethlehem Foundry and Machine Company, the sale of which was authorized by the order of the District Court, affirmed by the Court of Appeals. The Court of Appeals, in its opinion, found the amount due Respondent (we shall refer to Louis Dreyfuss, appellee below in this opposing brief as Respondent) as pledgee to be about Two Hundred Twenty-Six Thousand Dollars. All of the stock in question was held as collateral security by Respondent, Louis Dreyfuss, together with Maurice Wolf and Albert J. Grosser Co. for obligations aggregating Five Hundred Twenty-five Thousand Dollars, more or less. The Court of Appeals found that the trustees, appellees below, had not sufficient funds to redeem the stock. (Petition, p. 23.) Actually, the trustees had on April 30, 1955 on hand the sum of $13,000 (Tr. 31) in free funds.

The secured creditors, the Court of Appeals found, possessed a power of sale of the stock pledged, which they were prevented from exercising by the pendency of the reorganization proceedings. These proceedings have been pending since May 20, 1953. (Petition, p. 17.) No suggestion for a plan of reorganization was ever submitted by the debtor, and the only suggestion of any sort which either it or Dyner, its sole stockholder, had submitted to the Court for ending the proceedings was the so-called Armstrong offer, which the District Court and the Court of Appeals held to be too vague and inadequate for con-

sideration. (Petition, pp. 24-25.) No creditor objected to the sale. (Petition, p. 24.) The stock was appraised for $775,521.64, and the sale was made for $910,129.58 in cash. The order appealed from provides for the satisfaction of the pledgees' claims out of the purchase price.

SUMMARY OF THE ARGUMENT.

1.

The order of sale appealed from was a means of satisfying the overdue claims of this respondent and other pledgees, who had legal title to the stock sold; these pledgees have been held captive in the proceedings in the District Court since May 20, 1953.

2.

There is no conflict between the decision of the Court of Appeals in this cause and applicable decisions of this and of other Courts.

ARGUMENT.

1.

The Order of Sale Appealed From Was a Means of Satisfying the Overdue Secured Claims of This Respondent and Other Pledgees, Who Had Legal Title to the Stock Sold: These Pledgees Have Been Held Captive in the Proceedings in the District Court Since May 20, 1953.

We have here a case in which the debtor of its own volition applied to the Court for relief under the provisions of Chapter X of the Bankruptcy Act. This voluntary act of the debtor bears date May 20, 1953; in a relatively short time this seemingly interminable voluntary Chapter X will celebrate the third anniversary of its filing.

During this entire time, a period of duration never contemplated by the proponents of the act or by Congress —not a single workable suggestion for the termination of the proceedings has come from the petitioner in this cause or from Dyner, its sole stockholder.

The power of a Court of Bankruptcy in a Chapter X proceedings to fasten upon a pledgee such as this respondent, an injunctional order preventing him from exercising his rights must be conceded. The Court, however, can determine with no more than momentary consultation with its own conscience, that this is a harsh step, which may be justified only by the thought that the life of a going business might be saved thereby. It is not consistent with equity and good conscience that a proceedings in Chapter X be kept pending not to effect a reorganization as that term is understood in the act but to obtain a moratorium on secured debts. Nor is it lawful that a pledgee's

rights be enjoined interminably without prompt and effective action to achieve the professed objective of the Chapter X, namely, the effecting of a plan of reorganization. It is to be seen from the reading of the opinion of the Court of Appeals and the examination of the record that not merely no suggestion to terminate these proceedings has been made by either the debtor or its sole stockholder, but as far as this record indicates, if the Court of Appeals had reversed this order, the only effect of such reversal would have been to extend the moratorium on these secured debts for a further indefinite period.

This appellee has been and is now demanding payment of his debt months and years after its maturity. The trustees have no money to pay any substantial part of the debt. (Petition, p. 18.) It follows, therefore, that on this record there are at present these alternatives:

(a) The dissolution of the injunction restraining the sale of the stock by the pledgees and the sale of the stock by the pledgees under their power of sale,

(b) The sale by the trustees of the stock pursuant to the order under consideration and the payment of the pledgees' debts, or

(c) The continuing of the restraining order against this respondent and the other pledgees with no time indicated as to its termination.

The last alternative is, on its face, a legal impossibility.

We have noted that the filing of this petition, a voluntary act of the debtor, bears date of May 20, 1953. Implicit in this submission to the Court of its financial problems was a representation that the pattern of its affairs was such as to give the debtor cause to believe that it could suggest to the trustees with reasonable dispatch a plan of reorganization within the purview of Chapter X.

There is a further element that enters into the consid-

eration of the present Petition for Certiorari. The Court of Appeals found that the stock in question was not used by the debtor in its business. Even so, no suggestion appears in this record as to how this stock would be made a part of a pattern of reorganization as defined *In re Solar Manufacturing Company,* the case cited by the Petitioner. The Court of Appeals in its opinion considers the so-called Armstrong offer. It is not difficult to gather from the language of the Court of Appeals in this connection that the Armstrong offer was not much more than a hoax. If that is too strong a statement, quite manifestly the Referee, the District Judge and the Court of Appeals were all agreed that the Armstrong offer did not contain the elements of a proposal for reorganization which the trustees or the Court could consider.

If there is nothing in this record after a lapse of two years and many months, that could be called a suggestion by the debtor either to reorganize the affairs of the debtor or to find a method of paying these pledgees, does not the conclusion follow that this Chapter X insofar as it relates to the stock in question was nothing more than a device to hinder and delay these pledgees in the payment of their debts?

The moral factors involved are in danger of becoming lost in semantics. There was a promise to pay at a fixed time and security was given to these pledgees without which they would not have made the loans. The injunction of this Court against the pledgees was a deprivation of right which becomes narrowly defensible as a contribution exacted from an innocent bystander at his cost to the estate of the debtor and in that way to the common good. It never was the congressional intent to deprive, in effect, a pledgee who is without guilt, of the actual value of his pledge or curtail his rights without compensation by giving to a designing debtor the power to im-

pose a moratorium of indefinite duration on the debt. The moral considerations here involved are so manifest that the citing of authorities appears superfluous. We shall cite some authorities notwithstanding our view that authorities on the foregoing concept are as unnecessary as they would be on the proposition that the law does not approve of larceny.

Not merely does this record show no recognition by this debtor of the moral quality of a debt and of the duty of a debtor to see that a pledgee is paid but its conduct from the beginning has been one of obstruction, persistent and continuous. In the District Court, in the Court of Appeals and on this application for certiorari, this debtor's scheme is transparent. It is to delay the payment of this debt in the hope that the processes of inflation will enrich the debtor to the detriment of the pledgee.

This pledgee we say again is demanding payment of its debt and asserting that it would be a wrong to continue this injunction two years and many months after the entry of it, with no hint as to when or how, if ever, the debt of this pledgee would be paid.

The finding by the Court of Appeals that the stock in question was not used by the debtor in the conduct of its business (Petition, p. 23) is another way of saying that there is nothing in this record and the court below found nothing to indicate any relation between this stock and any plan of reorganization that might possibly have been suggested. The sale of the stock would not have taken anything away from the continued operations of the Petitioner's business or from a plan of reorganization conforming to the pattern of a plan found in *Re Solar Manufacturing Co.* case cited by petitioner.

We quote an excerpt from Collier on Bankruptcy, Vol. 6, 14th Ed., p. 745, as follows:

> "A staying order under section 116(4) should not be merely an automatic response to a plea therefor or to the sole fact that reorganization proceedings are in progress (citing cases) • • • The order, if made, must not only be related to the purpose of the proceeding—reorganization—but it must contribute to the furtherance of achieving a plan (citing cases) • • • Without such reasonable possibility of achievement, a secured creditor may not be indefinitely restrained from realizing on his security (citing cases)."

See also *Lincoln-Alliance Bank & Trust Co.* v. *Dye,* 115 Fed. (2nd) 234.

From the foregoing it would appear that neither the arguments nor the authorities found in the Petitioner's Brief have any application to this case. This is not a sale of assets of a debtor, which in their aggregate were required to "maintain going concern values and to readjust a business life so that it can continue" as found in *Re Solar Manufacturing Corporation,* 176 (Fed.) 2nd 493. It is a sale to satisfy pledgees of stock in whose name this stock now appears. The trustees have an equity in the stock acquired by debtor as a speculation which they are seeking to salvage by means of this order.

The moral and legal right of these pledgees to be paid was recognized by the District Court and the order of sale to carry this purpose into effect was affirmed by the Court of Appeals. No argument appears on behalf of the petitioner or can be advanced to bring into question the correctness of this conclusion.

II.

There Is No Conflict Between the Decision of the Court of Appeals in this Case and the Applicable Decisions of This Court and Other Courts.

The voluntary Petition in this cause was approved as having been filed in good faith. No appeal from this order was presented and the correctness of that determination is not now open to question on this petition. The case of the *Fidelity Assurance Association* v. *Sims*, 318 U. S. 608 (Petition, p. 7), being the dismissal of a petition as not filed in good faith cannot therefore have any bearing here and is not inconsistent with the decision of the Court of Appeals.

The Court of Appeals in the instant case cites (Section 115 of Chapter X) 11 U. S. C. A., Section 115, as follows:

> "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

Also Section 116 (11 U. S. C. A., 516):

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court * * * authorize * * * a trustee * * *, upon such notice as the judge may prescribe and upon cause shown, to * * * sell any property of the debtor, whether real or personal upon such terms and conditions as the judge may approve."

It will be observed that both of these sections are grants of power to the Court and the judge upon the approval of

petition in Chapter X. Under this record, the sole question that arises here is whether the District Court after an order of approval had under the provisions of sections 115 and 116 of Chapter X power to deal with the problems confronting the Court upon this attempt by the trustees to satisfy the overdue claims of these pledgees and salvage something for the estate out of the equity in the pledge stock.

The language of these sections is too clear for construction. The argument of the Petitioner is an attempt to emasculate clear language. If adopted, it would leave the District Court without power to relieve this respondent from an injunctional order of too long duration while at the same time enabling the trustees to salvage for the estate the equity in the stock. The cases in *Re Solar Manufacturing Co.*, 176 Fed. (2d) 493 and in *Re Pure Penn Petroleum Co., Inc.*, 188 Fed. (2d) 851 are not as claimed in this Petition inconsistent with or overrule the case of *Frank* v. *Drinc-O-Matic, Inc.*, 136 Fed. (2d) 906 and they do not undertake to contradict or distort the clear import of the language of the cited sections.

The sequence of these decisions is as follows: In *Re Solar Manufacturing Corporation* follows in *Re Loewer's Gambrinus Brewing Co.*, 141 Fed. (2d) 747 which it cites. The Solar Manufacturing Corp. did not criticize the *Gambrinus Brewing Company* case but on the contrary cited it with approval.

When we turn to the case of in *Re Loewer's Gambrinus Brewing Company* we find that that case rests squarely on the authority of *Frank* v. *Drinc-O-Matic, Inc.*, 136 Fed. (2d) 906 cited by the Court of Appeals in this case in its opinion. The language of the Court in the *Gambrinus Brewing Company* case is: "Our decision in *Frank* v. *Drinc-O-Matic, Inc.*, 136 Fed. (2d) 906 is the authority for

the order of sale appealed from, etc." The confusion that seems to arise in counsel's mind may be due to the comments of the Court in *Re Solar Manufacturing Corporation*, 176 Fed. (2d) 493 on page 494. There the Court discusses sales under 116 (3) and indicates that these sales are to be confined to "emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken."

It is true that the Court in *Re Loewer's Gambrinus Brewing Company* makes reference to the excessive deterioration in the brewery equipment if not sold. And it is also true that the Court in *Re Solar Manufacturing Corporation* refers to perishable property as coming within the scope of the emergency that was being considered. However, in the footnote to the case, we find two illustrations that are intended to clear up the term "perishable". One is a case where a lease has only 60 days to run. In *Re Rosenbaum Grain Corp.*, 83 Fed. (2d) 391. The second illustration is on facts identical with the case now being considered by the Court. The exact language of the footnote is as follows:

> "A debtor's vending machines may be sold when they are in the hands of the manufacturer, who claims a lien upon them, and when the trustee has no funds with which to redeem them. *Frank* v. *Drink-O-Matic, Inc.*, 136 Fed. (2d) 906."

If we therefore trace the holding in *Frank* v. *Drink-O-Matic*, 136 Fed. (2nd) 906 through the *Gambrinus Brewing Company* case and the *Solar Manufacturing Corporation* case, we find no dissent or difference but approval. It would be quite surprising if it were otherwise as the distinguished Court in *Frank* v. *Drink-O-Matic* reads the language of Section 116(3) so as to give effect to its unambiguous words.

SUMMARY.

The foregoing may be summarized as follows:

This respondent is a pledgee of shares of corporate stock found by the Court of Appeals not used by the debtor in the prosecution of its business. The debtor filed a voluntary petition under Chapter X on May 20, 1953 and there came the resultant injunction against this respondent and the other pledgees availing itself of rights under the pledge agreement. The respondent is an innocent party to the transaction and the continuing of the injunction after the lapse of two years and many months is a deprivation of right. The debtor has not in all this long period of time suggested any method for the payment of respondent's debt as pledgee or a possible plan of reorganization involving this stock. No suggestion appears in the record in that direction. An objective survey of this record forces the conclusion that this Chapter X as it involves the stock in question is actually a device to hinder and delay this respondent and the other pledgees. That the manifest right of the pledgees to have the injunction at this late date dissolved must of necessity give to the District Court the power to protect the estate by a sale of the stock to rescue the equity for the benefit of the estate. This power is manifest under Section 115 of Chapter X or Section 116(3) of Chapter X.

In view of these circumstances, the cases and the contentions of Petitioner are not any answer and do not meet the manifest conclusion that the conduct of the debtor is a perversion of the intent of Chapter X and achieves a flagrant wrong.

In *Re Solar Manufacturing Corporation* relied upon by Petitioner does not attempt to overrule or criticize *Frank*

v. *Drink-O-Matic,* cited by the Court of Appeals in its opinion but on the contrary, its holdings rest ultimately upon *Frank* v. *Drink-O-Matic* as does the case of *Loewer's Gambrinus Brewing Company,* cited by the Court in the case of in *Re Solar Manufacturing Company.* In *Re Pure Penn Petroleum Co., Inc.,* 188 Fed. (2d) 851 is a Chapter XI case in the same circuit as the case of *Frank* v. *Drinc-O-Matic* and no reading of this case suggests any intention to overrule or criticize *Frank* v. *Drinc-O-Matic.* As a matter of fact, Judge Chase who was a member of the Court deciding *Frank* v. *Drinc-O-Matic* was also a member of the Court deciding in *Re Pure Penn Petroleum Co., Inc.*

Conclusion.

On the assumption that this Petition for Certiorari was filed in good faith and not for the purpose of delay or obstruction yet the Petition for Certiorari rests upon misapprehension of the case itself and the law applicable to it. The Petition for Certiorari should be denied.

Respectfully submitted,

HENRY S. BLUM,
Attorney for Louis Dreyfuss, Defendant.